RECENT DECISIONS.

AGENCY—AGENT'S DUTY OF GOOD FAITH—PRINCIPAL'S RIGHT TO RECOVER COMMISSIONS. An agent authorized to sell real estate received a secret profit from the purchaser, as well as his commission from the principal. The latter, having already recovered the secret profit, sued to recover the commission. *Held*, the plaintiff could recover. *Andrews* v. *Ramsay & Co.* [1903] 2 K. B. 635.

Though it is well settled that an agent is precluded from recovering a commission where he acts for interests adverse to those of his principal, *Farnsworth* v. *Hemmer* (Mass. 1861) 1 Allen 494, this case is practically the first to hold that the principal may recover the commission back after having paid it. Agency being a fiduciary relation rests in its very essence upon the idea that the agent shall act with a sole regard to the interests of his principal, with disinterested skill and zeal. In a sale the duty to sell for the highest price for one party and buy at the lowest for the other, renders it impossible for one to act as agent for both parties without their consent. *Rice* v. *Wood* (1873) 113 Mass. 133. Secret profits belong to the principal. *Mayor of Salford* v. *Lever* [1891] 1 Q. B. 168. The agent in view of such conduct earns no commission and where paid it may be recovered under the rule that where money is paid under a mistake of fact, it may be recovered as for a failure of consideration. Such conduct amounts to a fraud on the principal. *Palmer* v. *Pirson* (N. Y. 1893) 4 Misc. 455.

AGENCY—UNDISCLOSED PRINCIPAL—ELECTION. With full knowledge of the existence and identity of a principal, and his part in a given transaction, the plaintiff brought suit against the agent, and execution issued on the judgment he obtained. *Held*, this was such evidence of an election to hold the agent as to bar a subsequent action against the principal. *Barrell* v. *Newby* (C. C. A. 7th Circ., 1904) 36 Chicago Legal News, 342. See NOTES, p. 22.

BANKRUPTCY—PREFERENCE—INTENT OF DEBTOR. Bankruptcy Act, 1898, § 60, provides (a) that an insolvent gives a preference if he makes a transfer by which any creditor is enabled to obtain a greater percentage than other creditors of the same class, and (b) that the trustee may recover such preference if the person receiving it had reasonable cause to believe that a preference was intended. *Held*, the trustee may recover without proving an intent on the part of the insolvent to give a preference. *Benedict* v. *Deshel* (N. Y. 1903) 68 N. E. 999. HAIGHT and CULLEN, JJ., dissenting.

In the Act of 1867, § 35, the debtor's intent to prefer was a necessary part of a preference. The words requiring such intent were omitted from the Act of 1898, § 60 (a), and the courts have considered this omission as indicating that Congress intended to dispense with the preferential intent. *Pirie* v. *Trust Co.* (1900) 182 U. S. 438. A mere payment, within four months preceding the filing of the petition, or after the filing and before the adjudication in bankruptcy, giving one creditor an advantage over others, now constitutes a preference, voidable by the trustee on showing that the person receiving it had reasonable cause to believe a preference was intended. Collier on Bankruptcy, 4th ed., § 60.

BANKRUPTCY—SURRENDER OF PREFERENCE—MEANING OF TRANSFER. Within four months of the adjudication an insolvent deposited money subject to check in a bank which had claims against the depositor for notes discounted. *Held*, not a "transfer of property the effect of which would enable the creditor to obtain a greater percentage of his debt than

any other," and so, within the meaning of the act, creating a preference which the bank must surrender before being allowed to prove for the balance. *N. Y. County Nat'l. Bank* v. *Massey* (1904) 24 Sup. Ct. Rep. 199.

Money has been held to be property within the intent of this section, so the sole doubt was as to what was comprehended by the term "transfer." In another part of the act it is described as including "the sale and every other and different mode of disposing of or parting with property, * * * absolutely or conditionally, as payment, pledge, mortgage, gift or security." In *Pirie* v. *Chicago T. & T. Co.* (1902) 182 U. S. 438, liberality in the application of this word was promised, and if broadly construed this definition would seem to include the present transaction, the effect of which was obviously within the disapproval of the act. The court however avoids requiring a bank to surrender a deposit by insisting upon a distinction between transfers for the sole benefit of the creditor and those which create an obligation in favor of the bankrupt. That the creditor, as in the present case, obtains a greater percentage of his debt is only an indirect result of the second class of transfers, and they are not included within the strict letter of the act. The distinction brought out cannot be denied, but if, as the Pirie case maintains, "transfer" is here used in its most comprehensive sense, precluding all technicality and narrowness of meaning, both classes of transfer might be regarded as within the contemplation of the legislators, and this view would seem to better preserve the spirit of the enactment and secure that equality among creditors which was its object.

CARRIERS—EJECTMENT OF PASSENGER—MISTAKE OF CONDUCTOR. The plaintiff offered to pay his fare from a dollar bill which the conductor honestly believed to be counterfeit, and refusing to accept it, ejected the plaintiff. *Held*, as the plaintiff had offered his fare in legal tender his ejectment was unlawful and as an element of damage the injury to his character might be considered. *Breen* v. *St. Louis Transit Co.* (Mo. 1903) 77 S. W. 78.

Where a ticket void upon its face is tendered the carrier is relieved from liability in case of ejectment, on the theory of reasonable regulation. *Southern Ry. Co.* v. *Watson* (1900) 110 Ga. 681; 3 COLUMBIA LAW REVIEW 577; but where the ticket is valid, the conductor must act at his peril. *Chicago etc. Ry. Co.* v. *Conley* (1892) 6 Ind. App. 9; Hutchinson on Carriers § 593. The principal case is sound both on principle and authority. *Jersey City & Bergen R. Co.* v. *Morgan* (1889) 52 N. J. L. 60. It would seem unreasonable to allow the conductor to be the absolute judge of legal tender. *Ruth* v. *St. Louis Transit Co.* (1903) 98 Mo. App. 1.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—RACE DISCRIMINATION IN SELECTION OF GRAND JURY. The jury commissioners appointed in a county where a fourth of the population were negroes were all white men, and of the grand and petit jury lists drawn for the trial of the defendant only one name was that of a negro, and he was either dead or had left the county years before. *Held*, the defendant was deprived of the equal protection of the laws. *Smith* v. *State* (Tex. 1903) 77 S. W. 453.

The decision is in accord with holdings of the courts both of the United States, *Carter* v. *Texas* (1900) 177 U. S. 442; *Strander* v. *West Virginia* (1879) 100 U. S. 303, and of the states, *State* v. *Joseph* (1893) 45 La. Ann. 903; *Commonwealth* v. *Johnson* (1880) 78 Ky. 509; though by denying that discrimination was shown in the particular case, the state courts seem inclined to avoid disturbing a verdict, saying that the fact that no negroes were put on the grand jury is not proof, alone, of discrimination. *State* v. *Joseph*, supra; *Cavitt* v. *State* (1883) 15 Tex. App. 190. In *Carter* v. *Texas*, supra, the court say: "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons

of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment to the Constitution of the United States." See 1 COLUMBIA LAW REVIEW 196.

CONSTITUTIONAL LAW—FOREIGN JUDGMENTS—FULL FAITH AND CREDIT. Both the plaintiff and the defendant in an action brought in New York on a judgment obtained in Illinois were foreign corporations. Under the provisions of the New York Code of Civil Procedure, § 1780, one foreign corporation cannot sue another in the New York courts unless the cause of action arises within the state. *Held*, upon demurrer to the jurisdiction, that the action could not be maintained. *Anglo-American Provision Co.* v. *Davis Provision Co.* (1903) 24 Sup. Ct. Rep. 92.

The plaintiff sued in Indiana upon a personal judgment obtained in Pennsylvania against a non-resident without personal service or appearance by the defendant. *Held*, the action could not be maintained. *Dunn* v. *Dilks* (1903) 68 N. E. 1035.

There is no constitutional inhibition which forbids legislation by the states upon the remedy in suits on judgments obtained in other states, so long as such legislation does not go to the merits. *McElmoyle* v. *Cohen* (1839) 13 Pet. 312. Art. IV, Sect. 1, Const. U. S, establishes a rule of evidence and does not go to the jurisdiction. *Wisconsin* v. *Pelican Ins. Co.* (1887) 127 U. S. 265; Story, Confl. L. § 609. The Illinois judgment could have no extraterritorial force, and it would seem clear that New York may deny a jurisdiction for it. § 1780 goes to the remedy and is constitutional. While, generally, a regular foreign judgment is entitled to full faith and credit when the same question is presented for decision in another state, *Hanley* v. *Donoghue* (1885) 116 U. S. 1, 4, to give it the force of a judgment, it must be made a judgment there, and the court of the forum may inquire into the jurisdiction of the first State over the parties and subject-matter. *D'Arcy* v. *Ketchum* (1850) 11 How. 165; *Pennoyer* v. *Neff* (1877) 95 U. S. 714.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—DISTRIBUTION OF PROCEEDS OF LICENSES. The charter of a city provided that moneys received from licenses in the city should be apportioned one-fourth to the state, one-fourth to the county and the remainder to the city. *Held*, the provision is in contravention of the Bill of Rights, declaring that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without compensation. *State* ex rel. *City of Reno* v. *Boyd* (Nev. 1903) 74 Pac. 654.

It is impossible to support this decision on the ground first given. The power of the legislature to tax is unlimited except as specifically restrained by the Constitution. In the matter of *Van Antwerp et al.* (1874) 56 N. Y. 261. The municipal corporation is created by the State, as a governmental agent of the State, and the State may, in turn exercise general control of its public property. *Mount Hope Cemetery* v. *Boston* (1893) 158 Mass. 509. On the other hand, the statute being a special one—the provisions of which were not applicable to other cities, it becomes apparent that the taxpayers of Reno, as individuals, were indirectly subjected to an exceptional and unjust burden. And there is authority for the position that such an enactment is unconstitutional. Cooley, Taxation, pp. 140–144. See 35 Am. St. Rep. 525 for a note on "Legislative Control over the Property of Municipalities."

CONSTITUTIONAL LAW—STARE DECISIS. Having declared an act of the legislature valid and constitutional, *held*, the Supreme Court, may reverse that decision if no vested rights will be thereby affected. *State* v. *Lewis* (1903), 48 Ohio Bulletin, 1001.

A decision upon a point of common law will not be reversed except for the most cogent reasons, if such reversal will affect property or contract rights. Cooley's Const. Lim., 7th ed. 83; *McVay's Adm'r* v. *Ijams* (1855) 27 Ala. 238. The question presented by the dictum in the prin-

cipal case is whether the same rule should be applied to decisions involving constitutional questions. On principle it would seem that an unconstitutional act being a nullity, no rights could vest thereunder, and that therefore the rule should be ignored. *San Francisco* v. *L. V. N. N.* (1874) 48 Cal. 493, 523; *Higgins* v. *Bordages* (1895) 88 Tex. 458. It has been decided, however, that sufficient equities can be acquired against the United States, under an unconstitutional act of Congress to justify an appropriation in their discharge, *U. S.* v. *Realty Co.* (1896) 163 U. S. 427, and the policy, which favors stability in property and contract rights, has been invoked to justify the rule, and this, even though the court admits that, were the question a new one, a different conclusion would probably be reached. *Fisher* v. *Haricon Iron Co.* (1860) 10 Wis. 351. But here it would appear that the interests of justice would be sufficiently served by withholding from the decision any retroactive effect. This avoids the difficulty, on the one hand, of denying the inception of rights, and, on the other, of perpetuating error. For a discussion of a change of opinion as a law impairing contract obligations, and Federal jurisdiction therein, see *Storrie* v. *Cortes* (1896) 90 Tex. 283; 3 COLUMBIA LAW REVIEW, 272.

CONSTITUTIONAL LAW—TAXATION—DUE PROCESS OF LAW. A statute provided that possession of a tax receipt should be conclusive evidence that all taxes had been paid on the property and should be a bar to their collection. *Held*, the statute was repugnant to the constitutional provision that no person shall be deprived of property without due process of law, and to the provision that all laws exempting property from taxation shall be void. *Harris* v. *Stearns* (S. Dak. 1903) 97 N. W. 361.

Assuming the court's interpretation of the statute to be correct the decision may be supported, not on the ground that the county was—as a person—deprived of property, but because any attempt on the part of the legislature to establish a conclusive rule of evidence is, generally, in itself unconstitutional. Cooley, Cons. Lim., 7th ed., 526. In this case, moreover, the law would tend to exempt property from taxation by precluding the county from introducing facts, if any, showing that the tax had not, in fact, been paid.

CORPORATIONS—LABOR UNION—INJUNCTION—CONTEMPT. In a suit for violation of a "strike" injunction against an incorporated labor union, *held*, as the acts of the strikers amounted to a corporate breach of the injunction, the corporation was liable to a fine for contempt of court. *Chicago Typothetæ* v. *Franklin Union* (Ill. 1903) 36 Chicago Legal News 142.

That an injunction can be granted against a corporation and a fine imposed for violation of such injunction is well settled. *Cary Mfg. Co.* v. *Acme Co.* (C. C .A. 2d Circ., 1901) 108 Fed. 873; *Mayor* v. *Ferry Co.* (1876) 64 N. Y. 622; Morawetz on Private Corporations, 2nd ed. § 734. The reason why the injunction has not been used against labor unions before is probably, as the court says, because so few of them are incorporated. The difficulty in such cases is one of fact i. e. finding a corporate breach. In the principal case the facts seem reasonably to sustain the court in such a finding, for the evidence showed that though some of the union's officers had taken part in the assaults, and had offered bribes to employees which were paid by the union treasurer, they were not informed against at union headquarters, nor were any strike benefits withheld.

CORPORATIONS—NATIONAL BANKS—POWERS—LEASE. The Broadway National Bank of which the plaintiff in error was the receiver leased the property of the defendants in error for a term extending beyond the duration of its charter. The lease provided that it should be assignable only with the consent of the lessor. In an action upon the lease the plaintiff in error contended inter alia that the lease was ultra vires and void. *Held*, the lease was valid. *Weeks* v. *International Trust Co.* (C. C. A. 1st Circ., 1903) 125 Fed. Rep. 370.

The rule is well settled that a corporation may acquire land in fee or may accept a lease for a term which will outlast its corporate life whenever the interest in the property is alienable at or prior to dissolution. *Detroit Citizens St. Ry. Co.* v. *City of Detroit* (1894) 64 Fed. Rep. 628; *Brown* v. *Schleier* (1902) 118 Fed. 981. But notwithstanding the requirement of alienability the corporation by assignment does not free itself from liability on the covenants in the lease. Yet the question remains whether this lease may be termed assignable. It would seem that the court properly so construed it, even though it could be assigned only upon a condition. The result of the decision is further fortified by the provision permitting a national bank to renew its charter as a matter of course. Comp. St. 1901, p. 3, 457.

CORPORATIONS—NON-LIABILITY OF BANK AS PARTNER—JOINT STOCK COMPANIES. The defendant in error, the plaintiff below, sought to hold the Merchant's National Bank liable as partner on its stock in a joint-stock company organized for the purpose of dealing in real estate. The bank was alleged to be owner on the ground that it caused stock, held by it as collateral, to be transferred to it on the books of the company on surrender of the note which the stock secured. The defendant below pleaded that it never became a partner but held the nine shares merely as collateral. *Held*, the bank had no power to assume the liability of a partner, and could not be held on that ground; but that the transfer of the stock to the bank made it legal owner of the stock, and consequently it became an owner of the realty held by the stock company, and therefore became liable for its share (nine-fortieths) of the expenses incurred in "purchasing, holding, managing, improving and disposing of said property." *National Bank* v. *Wehrmann* (1904) 68 N. E. 1004. See NOTES, p. 220.

CRIMINAL LAW—ATTEMPT TO BRIBE. The defendant Butler was indicted for an attempt to bribe. The City Council of St. Louis passed an ordinance directing the Board of Health to enter into a contract for the removal of the city's garbage. Pending the awarding of the contract the defendant offered one Chapman, a member of the board, a bribe if he would vote to give the contract to a certain company in which Butler was interested. The indictment was based on a statute defining an attempt to bribe to be offering a reward to a public officer to influence his decision "on any matter which may be then pending or which may by law be brought before him in his official capacity." *Held* the defendant was not guilty as the ordinance was illegal and void and the matter could therefore not be brought before Chapman by law in his official capacity. *State* v. *Butler* (Mo. 1903) 77 S. W. 560. See NOTES, p. 214.

EQUITY—INADEQUACY OF LEGAL REMEDY—JURISDICTION OF FEDERAL COURTS. The defendant brought an action in a State court to recover on an insurance policy. The plaintiff filed a bill in equity in a Federal court asking for a cancellation of the policy on the ground of fraud and alleging inadequacy of legal remedy (1) because, under a State statute, it could not remove to a Federal court the action instituted by the defendant, without losing its license to do business in the State, and (2) because the law as applied in the Federal courts was more favorable to the plaintiff than in the State courts. *Held*, there was not such inadequacy of legal remedy as would justify equity in taking jurisdiction. *Cable* v. *Ins. Co.* (1903) 191 U. S. 288.

Under *Ins. Co.* v. *Bailey* (U. S. 1871) 13 Wall. 616, the court could only take jurisdiction if the plaintiff's remedy at law was inadequate, and the facts of the principal case do not seem to show such inadequacy. The plaintiff had the power to remove to a Federal court the suit instituted by the defendant, *Ins. Co.* v. *Morse* (U. S. 1874) 20 Wall. 445, and the fact that by so doing its license might be lost, was the result of its own act in accepting the license with such a condition attached. Having such right of removal the second ground also fails, for the case would come under the jurisdiction of the Federal courts by such removal.

EVIDENCE—COMPETENCY OF WITNESS. The plaintiff was the grantee of an easement in certain land. Twenty-one years thereafter the land was conveyed to the defendant without reference to the easement. After the death of the grantor the plaintiff sued to establish the easement. The defendant pleaded an abandonment by reason of the adverse user of the land by the grantor for a period upwards of twenty years. In rebuttal the plaintiff sought to show that the seeming adverse user by the deceased grantor was by the plaintiff's permission. *Held*, the plaintiff was not a competent witness to show such fact. *Pascal* v. *Fels* (Penn. 1903) 56 At. 320.

Under the statute in Pennsylvania, 1887 P. L. 159, when one of the parties to a transaction is dead and his right has passed to the party on the record who represents his interest in the subject of the controversy the surviving party whose interest is adverse is incompetent to prove any transaction between himself and the deceased. *Karns* v. *Tanner* (1870) 66 Pa. 297; *Arthurs* v. *King* (1877) 84 Pa. 525; *Chase* v. *Irvin* (1878) 87 Pa. 286. Similar statutes have been passed in nearly all of the States. N. Y. Code Civ. Proc. § 829. See also U. S. Revised Statutes § 858. Such evidence, however, may be given in rebuttal when the representative of the deceased is examined in his own behalf. *Lewis* v. *Merritt* (1889) 113 N. Y. 386; *Nay* v. *Curley* (1889) 113 N. Y. 575. The purpose of these statutes is to place the parties upon an equal footing and prevent the surviving party to the transaction from assuming the unjust position of offering his version of it when death has stopped the mouth of the other party. *Card* v. *Card* (1868) 39 N. Y. 317.

EVIDENCE—COMPETENCY—TRACKING OF DEFENDANT IN CRIMINAL ACTION BY BLOODHOUNDS. The trial court admitted evidence of the behavior of bloodhounds in apparently trailing the defendant, there being no corroborative evidence. *Held*, erroneous. *Brott* v. *State* (Nebr. 1903) 97 N. W. 593.

It has been held that evidence of the behavior of trained bloodhounds may be introduced, *Hodge* v. *State* (1892) 98 Ala. 10; *Simpson* v. *State* (1895) 111 id. 6, but where there was no evidence of the bloodhounds being trained, the evidence was held to be inadmissible. *Pedigo* v. *Commonwealth* (1898) 103 Ky. 41. In all of these cases there was other testimony as to the facts sought to be shown by the actions of the bloodhounds, while in the principal case there was none. The court in the principal case seems to go, partly at least, on the ground that the jury, influenced by a superstitious belief in the bloodhound's infallibility, will give too much weight to this evidence. The question of the weight to be given evidence is usually for the jury.

INSURANCE—MUTUAL BENEFIT ASSOCIATION—AMENDMENT OF BY-LAWS. In a certificate of insurance it was specifically agreed that the laws of the association then in force or which should thereafter be adopted should form the basis of the contract. An amendment was subsequently passed reducing the amount to be paid in case of suicide. *Held*, the insured was bound by the amendment. *Eversburg* v. *Supreme Tent, K. of M.* (Tex. 1903) 77 S. W. 246.

A certificate provided for payment "as provided in the laws of the order," which included a provision for amendment. An amendment was passed changing the liability in case of permanent disability. *Held*, the insured is not bound. *Beach* v. *Supreme Tent, K. of M.* (1904) 177 N. Y. 100.

If payment is to be made as provided in the laws of the order, and they provide for amendments, it would seem immaterial whether or not such a provision were expressly made in the certificate. The New York decision turns on this distinction, however, and the holdings may, in a measure, be reconciled in accordance with it. The Texas case seems unquestionably sound, though see, contra, *Hale* v. *Equitable Aid Union* (1895) 168 Pa. 377. That the authority to amend was not incorporated in the contract in the New York case seems scarcely tenable, *Bowie* v.

Grand Lodge L. of W. (1893) 99 Cal. 392, though well supported by authority. *Hobbs* v. *Ia. Mut. Ben. Assn.* (1891) 82 Ia. 107; *Starling* v. *Sup. Council R. T. of T.* (1896) 108 Mich. 440. See 3 COLUMBIA LAW REVIEW 423, 495, as to the remedy of the insured.

INSURANCE—WAIVER OF DEFENSE BY INSURER. The defendant, an insurer, refused to pay a policy for the alleged reason that premiums had not been paid. Upon suit brought the defendant set up a breach of warranty as an additional defense. *Held*, the defendant had waived the second ground of defense when, with full knowledge of the facts, it refused to pay upon the first ground alone. *Taylor* v. *Supreme Lodge etc.* (Mich. 1903) 36 Chicago Legal News, 173.

It is an accepted doctrine in the law of insurance that an insurer will be held to have waived a defense if he has led the insured to believe that it will not be relied upon and the insured, acting upon this belief has incurred expense. May on Insurance § 507; *Brink* v. *Ins. Co.* (1880) 80 N. Y. 108. The difficulty in the principal case is to find that the insured had been misled to his injury unless it be assumed that, had he been informed of the other defense, he would not have sued and would therefore have saved the cost of the suit. But this is problematical and would hardly seem a sufficient ground upon which to base an estoppel. Richards on Insurance § 84; see also 1 COLUMBIA LAW REVIEW 408.

INTERNATIONAL LAW—EXTRADITION—WARRANT OF ARREST. A United States commissioner authorized to issue warrants to seize for extradition issued a warrant for the apprehension of a fugitive. *Held*, the warrant could not be executed anywhere in the United States, but only if the fugitive were found within the district of the commissioner. In re *Walsh* (1904) 125 Fed. 572. See NOTES, p. 217.

MORTGAGES—STATUTE OF LIMITATIONS. Property which had been mortgaged in 1880 was granted in 1893 to the defendant by a deed reciting that he assumed the mortgage. By statute in Tennessee a mortgage lien is discharged at the end of ten years. In an action on the mortgage, *held*, the defendant by accepting such a deed was estopped from pleading the statute. *Christian* v. *John* (Tenn. 1903) 76 S. W. 906. See NOTES, p. 222,

PLEADING AND PRACTICE—DEFENSES ARISING AFTER JUDGMENT. Upon failure of the vendee to meet notes given for deferred payments under a contract for the purchase and sale of real estate the vendor recovered judgment on the notes and then rescinded the contract. *Held*, in an action to enforce the judgment the rescission could be pleaded as a defense since it arose subsequent thereto. *Ward* v. *Warren* (Ore. 1903) 74 Pac. 482.

The difficulty arising in this case was occasioned by the failure of the Court granting the rescission and ordering the cancellation of the contract to decree satisfaction of the judgment on the principle that the parties on a rescission should be placed in statu quo. *Gay* v. *Alter* (1880) 102 U. S. 79. Since the contract was rescinded after the rendition of the judgment it seems that the Court in the principal case rightly applied the rule that a judgment is conclusive only as to defenses arising prior to its rendition. Black on Judgments 9th ed. § 970; *Burwill* v. *Jackson* (1884) 9 N. Y. 535.

PLEADING AND PRACTICE—JURISDICTION—AMOUNT IN CONTROVERSY. In an action for failure to deliver a telegram, damages claimed for mental anguish were struck from the demand upon general demurrer. The principle of law involved was a doubtful one. *Held*, the amount remaining was the "amount in controversy," and not the whole sum claimed, and as that was not sufficient according to the statutory limitation of the court's jurisdiction, the court could not give judgment for the balance. *Western Union Telegraph Co.* v. *Arnold* (Tex. 1903) 77 S. W. 249. See NOTES, p. 216.

PLEADING AND PRACTICE—RES JUDICATA. A bill to establish a general maritime lien for supplies furnished a vessel was defeated on its merits, and thereafter a second bill was brought by the same libellant against the same libellee for the same supplies furnished to the same vessel, but based on a Massachusetts statute. *Held* to be res judicata, though the evidence necessary to maintain the second suit would not have been admissible in the first. *The New Brunswick* (C. C., D. Mass. 1903) 125 Fed. 567. See NOTES, p. 218.

PLEADING—RIGHT OF FOREIGN CORPORATION TO PLEAD—STATUTE OF LIMITATIONS. The street car line of the defendant ran in both Kansas and Missouri. The company was incorporated in Missouri where its home offices were situated. The plaintiff was injured in Kansas and brought suit there after the period of limitation had passed. *Held*, the action was not barred; the corporation was a non-resident, although it had an office in Kansas where it could be served with process. *Williams* v. *Met. St. Ry. Co.* (Kan. 1903) 74 Pac. 601.

The decisions are at variance as to whether a foreign corporation, doing business within the state, with an office where process can be served, can plead the statute. There seems no reason on principle, and, it might be added, no justice, in holding that the statute does not run in favor of the corporation if it was at all times liable to process and could be sued. Any other doctrine is based upon purely abstract notions of the corporate personality, and fails to subserve the purpose of the statute, i. e.—to bar the remedy "when a plaintiff, for the full period of limitation, has been in a position to sue upon his claim." The New York courts, however, on a similar statute, reached the same result as the principal case. *Rathbun* v. *N. C. R. Co.* (1872) 50 N. Y. 656; *Boardman* v. *Lake Shore & S. R. R. Co.* (1875) 84 N. Y. 157. Since the decisions in those cases the statute has been amended expressly exempting a foreign corporation, which has made a designation of an agent upon whom summons may be served, from the provisions relating to non-residents. N. Y. Code of Civ. Pro. §§ 401, 432. To-day, in New York, therefore, the statute would probably run in favor of a foreign corporation although the case of *Robeson* v. *C. R. R. of N. J.* (1894) 76 Hun. 444 appears contra. In that case, however, the point was not raised by the pleadings. For a discussion of the question see 6 Thomp. Corp. § 7841; 18 L. R. A. 524.

RESTORATION OF BENEFITS UNDER CONTRACT IMPOSSIBLE OF PERFORMANCE. The plaintiff agreed to do catering on a steamer of the defendant at the Coronation Naval Review for £300, payable in advance, no liability to be incurred in case the review were cancelled. A check was given, the payment of which was stopped, and the plaintiff brought action on the check. *Held*, the plaintiff was remitted to his original cause of action, and performance having become impossible, the defendant was excused. *Elliott* v. *Snitchley* (1903) 72 L. J. K. B. 927.

Held, in a like case, where money is paid in advance, it could not be recovered. *Society* v. *General Steam Navigation Co.* (1903) 72 L. J. K. B. 933.

The first case conforms to sound principle, merely holding that impossibility of performing the contract prevents either party from enforcing rights thereunder. *Taylor* v. *Saldurel* (1863) 32 L. J. Q. B. 164; *Krell* v. *Henry* (1903) 72 L. J. K. B. 794. The second follows the English decision in the "freight case" where a party having paid freight in advance is denied a recovery, when the contract becomes impossible of performance. *De Silvale* v. *Kendall* (1815) 4 M. & S. 37, which was later followed with reluctance. *Byrne* v. *Schiller* (1871) L. R. 6 Exch. 319. Though constrained to follow precedent the court favors the contrary American ruling. *Griggs* v. *Austin* (1825) 3 Pick. 20. While impossibility should be a good defense to an action for a breach, yet it does not justify the retention of profits paid by the other party in expectation of performance. Keener on Quasi-Contract 292. The equitable scope of the quasi-contract remedy should embrace this case. Where a loss of the subject

matter is involved with the impossibility of performance, the equities of parties being equal, the law leaves the loss where it has fallen. *Navigation Co.* v *Rennie* (1875) L. R. 10 C. P. 271.

QUO WARRANTO—APPOINTMENT AND REMOVAL OF OFFICERS. The respondent was appointed health officer by an illegally constituted board of health. He held at the pleasure of the board of health. Subsequently a legally constituted board appointed the relator to the same position, but the respondent refused to give up the office records and property upon demand. Quo warranto was brought. *Held*, judgment of ouster should issue. *State* v. *Craig* (Ohio 1903) Ohio Law Bulletin, Jan. 4, 1904.

Quo warranto is not the proper remedy when the term of office has expired. *State* v. *Jacobs* (1843) 17 Ohio 143; *Morris* v. *Underwood* (1856) 19 Ga. 559. A new appointment to an office held at pleasure operates as a removal of the incumbent. *People* v. *Carrique* (1841) 2 Hill 93, 98, *Williams* v. *City of Gloucester* (1889) 148 Mass. 256. The Ohio court finds that the acts of the first board were a nullity and that the second was the only lawful board from its appointment, and states (obiter) that quo warranto was not necessary to remove the illegally constituted board, because it held under no color of title. The same test should lead to the same result as to the health officer. He held the office under no color of title at the time the action was brought.

REAL PROPERTY—DEDICATION—RIGHT OF MUNICIPALITY TO USE PUBLIC SQUARE FOR PUBLIC BUILDINGS. A suit was brought by an owner of land adjoining a public square to restrain the municipality from erecting a fire-tower. *Held*, that the erection of building on land dedicated to the public as a square was a breach of trust by the municipality and could be restrained by the plaintiff as she had a special interest. *Fessler* v. *Town of Union* (N. J. 1903) 56 at 272.

The weight of authority seems to be that land dedicated as a "square," "park," or "place" is intended to be lett open, so the municipality can be enjoined from erecting even public buildings. *Church* v. *The City of Portland* (1889) 18 Or. 73; *Village of Princeville* v. *Auten* (1875) 77 Ill. 325; Dillon on Municipal Corporations § 645; 666 n. The theory of recovery is that the municipality holds a secondary title, in the nature of a public easement, in trust for the public. In the principal case, the court had difficulty in allowing the plaintiff to sue in her own right, but finally allowed her to maintain the action, as she had sustained special damages because of the location of her property. *Marsh* v. *Village of Fairburg* (1896) 163 Ill. 401; Dillon on Municipal Corporations, § 661. As dedicator she held the legal title, and so it would seem was entitled to bring an action on the ground that the land had been put to uses other than those to which it had been dedicated. *Weisbrod* v. *The Chicago and N. W. Ry. Co.* (1867) 21 Wis. 609; *Williams* v. *The N. Y. Central R. R. Co.* (1857) 16 N. Y. 97.

REAL PROPERTY—NATURAL GAS—WASTE. In an action to restrain the waste of natural gas, *held*, that though natural gas underlying the soil is not subject to ownership in its natural state, a lessee of natural gas land is limited to a reasonable use of gas obtained from wells sunk on the land and cannot waste it for the purpose of cutting off the supply and injuring the owners of other wells on adjoining land. *Louisville Gas Co.* v. *Kentucky Heating Co*, (Ky. 1903) 77 S. W. 368.

The court refuses to follow the prevailing rule as to percolating waters, which was applied in Pennsylvania under a similar set of facts. *Hague* v. *Wheeler* (1893) 157 Pa. St. 324. The advanced position is taken that the doctrine of reasonable use and correlative rights applies —not because there is any convincing or substantial distinction or principle between natural gas and percolating waters—but because "a man is only allowed to make a reasonable use of those natural supplies which are for the common benefit of all." This, however, seems to be justified by the interest the public have in conserving natural gas fields. *Manufacturers' Gas Co.* v. *Ind. Nat. Gas Co.* (1900) 155 Ind. 461.

REAL PROPERTY—PERCOLATING WATERS—REASONABLE USE. A railroad company sunk a well and, by means of pumping, exhausted the water from the plaintiff's well, using the water for its locomotives and machine shops. This the court found to be an unreasonable use of the land. *Held*, the plaintiff was entitled to recover. *East* v. *H. & T. C. R. Co.* (1903) 77 S. W. 646.

The case is similar in its facts to the case of *Forbell* v. *New York* (1900) 164 N. Y. 522, and the court reaches the same conclusion. On the general subject see 1 COLUMBIA LAW REVIEW 120, 133, 505; 3 Id. 425, 593; 4 Id. 143.

STATUTES—ANTI-TRUST ACT—RESTRAINT OF TRADE. A contract was made whereby certain cement was manufactured for and sold to the plaintiff in error, who agreed "not to sell said cement, ship same, or allow same to be shipped" outside of the State where it was delivered. *Held*, such a contract does not fall within the provisions of the United States Act, U. S. Comp. St. 1901, p. 3200, prohibiting combinations or conspiracies in restraint of trade between the States or with foreign countries, and is not, therefore, illegal. *Phillips* v. *Iola Portland Cement Co.* (1903) 125 Fed. 593.

What acts or combinations constitute a restraint of trade within the meaning of the term as employed in the enactment in question is not settled in our law. Although the Supreme Court of the United States has said that the act or contract need not be in unreasonable restraint of trade in order to come within the provisions of the law, *U. S.* v. *Joint Traffic Ass'n* (1898) 171 U. S. 505, it has recognized, on the other hand, that every restraint is not included. Accordingly, it has been held that ordinary agreements made bona fide, and reasonably regulating the manner of conducting the business of the engaging parties are not illegal. *Anderson* v. *U. S.* (1898) 171 U. S. 604. The test of the principal case seems to be that the act or contract becomes illegal only when the effect of it is to stifle or substantially restrict competition. See also *Whitwell* v. *Continental Tobacco Co.* (1903) 125 Fed. 454. No general rule can be laid down, however, as to what acts or agreements fall within the pale of the law.

TAXATION—CONSTRUCTION OF COVENANT. N. Y. Laws 1896, p. 800, § 8, provide that "rents reserved in any lease in fee * * * and chargeable upon real property within the State shall be taxable to the person entitled to receive the same as personal property." The plaintiff lessor granted certain premises in fee reserving a perpetual rent, each conveyance containing a covenant on the part of the defendant lessee to pay "all taxes * * * ordinary and extraordinary which shall be taxed * * * on the hereby demised premises * * * or on the said parties of the first part * * * in respect thereof." In compliance with the statute a tax was levied upon the rents which the plaintiffs refused to pay, claiming non-liability under the covenant. *Held*, the tax in question was not included in the covenant, since it was not a tax upon the premises or upon the plaintiffs in respect thereof. *Woodruff* v. *Oswego Starch Factory* (N. Y. 1903) 68 N. E. 994.

The court proceeds on the theory that the statute having severed the taxes on rents from the property and the tax being not upon the property but upon the income therefrom, the covenant was directed only toward such taxes as were imposed upon the premises. In *Van Rennselaer* v. *Dennison* (1850) 8 Barb. 22, it was held that a tax on rents was not a tax upon the landlord with respect to the premises. How far the doctrine of stare decisis controlled the decision it does not appear, but waiving that element the determination that a tax upon rents is not a tax upon the lessor with respect to the premises seems an over-nice refinement.

TAXATION—FRANCHISE TAX ON TRUST COMPANIES. N. Y. Laws 1901, Chaps. 132, 535, provide that an annual tax shall be imposed on trust companies assessed on the 30th day of June. The relator, a trust com-

pany, commenced business on the 24th of June. The comptroller having imposed the full amount of the annual tax, the question was taken on certiorari to the Appellate Division, where the action of the comptroller was confirmed. *Held*, the relator should not be liable for the whole tax for the fiscal year, but it should be apportioned with respect to the time within which the company had been doing business. *People* ex rel. *Mutual Trust Co.* v. *Miller* (N. Y. 1903) 69 N. E. 124.

The decision must turn upon the question whether the legislature intended an apportionment of this annual tax. A partial answer may be found in the fact that the statute expressly provides that the tax is one imposed annually "for the privilege of exercising its corporate franchise." Thus the exercise of the franchise, not its possession, is the basis of the tax, and from this it would seem to follow that in case a corporation had exercised its franchise for but a portion of the year it should be liable for but a portion of the tax. Even assuming that the question of legislative intent is doubtful it should be resolved in favor of the taxpayer. Matter of *Harbeck* (1900) 161 N. Y. 211, at p. 217.

TRUSTS—CHARITABLE USES—STATUTE FORBIDDING SUSPENSION OF POWER OF ALIENATION. The testator devised real property in trust for purposes of a public library. A statute prohibited the suspension of the power of alienation for a longer period than during two lives in being. *Held*, the statute applied to charitable uses, but the devise was sustained on other grounds. *Danforth* v. *City of Oshkosh* (Wis. 1903) 97 N. W. 258.

This is a proper object of a charity. 3 COLUMBIA LAW REVIEW, 269. The Wisconsin statute is modeled on that of New York, and the same confusion has ensued and the same unfortunate result that was reached as in New York prior to the remedial legislation of 1893, Laws N. Y., ch. 701, p. 1748, which followed upon the failure of the Tilden Trusts, 5 Harv. Law Rev. 389. *Holmes* v. *Mead* (1873) 52 N. Y. 332. But see *Williams* v. *Williams* (1853) 8 N. Y. 525 and *Allen* v. *Stevens* (1899) 161 N.Y. 122. Wisconsin took over the New York statute at a time when it had received a construction exempting charitable devises from its operation, *Shotwell* v. *Mott* (1844) 2 Sandf. Ch. 46, and there is great force in the view taken in the exhaustive dissenting opinion of MARSHALL, J., that the court should turn back to that construction without waiting upon legislation. There is authority for the proposition that charitable devises are impliedly excepted, even under a constitutional provision against perpetuities. *Paschal* v. *Acklin* (1863) 27 Tex. 173–196.

TRUSTS—OBLIGATION OF BANK IN WHICH TRUST FUNDS ARE DEPOSITED. The defendant gave his note to one A, a factor. Some money coming into A's hands belonging to the defendant, the latter directed A to apply the same to the note. A deposited the trust moneys to his own credit in the plaintiff bank, and subsequently indorsed the note to the bank. The bank had notice of the purpose for which A held the money. In an action on the note by the bank, *held* the bank was liable for meeting the checks of the trustee in favor of third parties, and for cancelling a claim which it held against the trustee personally, and therefore the defendant had a good defense to the action. *Interstate National Bank* v. *Claxton* (Tex. 1903) 77 S. W. 44. See NOTES, p. 213.